

## DISTRICT OF MAINE

**DEFENDANT**

**CRIMINAL No. 00-10-P-H**

**1**

1. FHWA officials consciously exceeded their authority in issuing the out-of-service order.

2. The Inspector General of the Department of Transportation, through the actions of Special Agent McGovern, illegally helped the FHWA in the investigation. This argument draws in large part upon the recent decision in Truckers United for Safety v. Mead, (ATUFS@, 86 F. Supp.2d 1 (D.D.C. 2000)). There, the court considered whether the Department of Transportation Inspector General (AIG@) had authority to conduct investigations into safety regulation compliance by motor carriers. See TUFS, 86 F. Supp.2d at 9. The court concluded that until the recent enactment of the Motor Carrier Safety Improvement Act of 1999, (AMCSIA@, Pub. L. No. 106-159, 113 Stat. 1748, the IG lacked general, transferred, or specific statutory authority to conduct such investigations.

3. FHWA State Director McEvoy and Special Agent McGovern went beyond their delegated powers in pursuing the investigation.

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(...continued)

upon by the defendant exhibit a conflict of interest on the part of his lawyer. In that connection, the government refers to an earlier motion it brought, which legitimately resulted in a Foster hearing. See United States v. Foster, 469 F.2d 1 (1st Cir. 1972). The government's current assertion, however, confuses the issues. What makes the government unhappy is the fact that this defendant now has access to certain materials that the government made available to his lawyer in connection with the sentencing of the related corporate defendant. But it has furnished no ground for suggesting that anything the lawyer has done has violated any duty of zealous advocacy for either client, or that either client has been prejudiced in any way by the joint representation. The fact that the government is unhappy with this defendant's access to certain materials has nothing to do with the issues of joint representation and Foster.

4. FHWA officials violated the Administrative Procedure Act when an adjudicative officer (who terminated agency review and permitted the case to go to the Circuit Court of Appeals for the District of Columbia for review) failed to disclose his earlier involvement in the case.

5. FHWA personnel and lawyers and Department of Justice lawyers lacked candor in what they told the Circuit Court of Appeals for the District of Columbia in a related case, Aulenback, Inc. v. Federal Highway Administration, 103 F.3d 156 (D.C. Cir. 1997), when they failed to disclose the status of grand jury deliberations here in Maine and when they described the asserted basis for the FHWA out-of-service order.

6. Special Agent McGovern's appearance before the Grand Jury was tainted because the Grand Jury may have been given an overly positive view of his law enforcement role, not informed by the view of his more limited authority as later defined by TUFS; and moreover that Special Agent McGovern's access to grand jury materials violated the rules of grand jury secrecy.

Some of these arguments are simply another attempt to attack the validity of the out-of-service order that this defendant is charged with violating. I have already held that this criminal case is an improper forum for such an attack, and that, instead of violating the out-of-service order (as he is alleged to have done), the defendant could/should have requested a stay of the order while he sought judicial review in the Court of Appeals as provided by the statute. Other assertions go farther than that, but they do not singly or in combination support

the relief requested, namely, a wholesale dismissal of the Indictment against this defendant, an Indictment that charges him with conspiracy to defraud the government, violating FHWA statutes and regulations, and criminally scheming to conceal his company's violation of the out-of-service order.

Accordingly, I **DENY** the motion to dismiss.

I also **DENY** the alternative relief requested, namely production of FHWA files, and access to Grand Jury testimony. No sufficient basis for such production or access has been shown.<sup>2</sup>

**So ORDERED.**

**DATED THIS 8TH DAY OF JUNE, 2000.**

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**D. BROCK HORNBY**  
**UNITED STATES CHIEF DISTRICT JUDGE**

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<sup>2</sup> The defendant concedes that he has no information to support his accusation of violation of grand jury secrecy rules. See Reply Br. at 7, n.5.

U.S. District Court  
District of Maine (Portland)  
Criminal Docket For Case #: 00-CR-10-ALL

ALAN ARCHIBALD  
defendant

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